Supreme Court, U.S.
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No. 94-1363
~~95-281~~

In The

Supreme Court of the United States

October Term, 1994

RICHARD ANDERSON; ROBERT EGGAN; CARL ENGLEHORN; NORRIS NIELSEN; TIMOTHY WANDERSEE; DONALD WOODS; PETER LOWRY,

Cross-Petitioners,

vs.

UNISYS CORPORATION, doing business as REMINGTON RAND UNIVAC, doing business as SPERRY UNIVAC, doing business as SPERRY, doing business as UNISYS, doing business as PARAMAX SYSTEMS,

Cross-Respondent.

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should claimants who filed ADEA administrative charges be barred from joining a representative or joint action when claimants who had not filed administrative charges are legally allowed to join.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding below are those listed in the caption on the cover of this petition.

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I. Review is requested because the Eighth Circuit's decision establishes a new precedent that undermines well established law on the "single filing rule", has the bizarre result of excluding claimants who file administrative charges from joint or class actions but including claimants who do not, and conflicts with and unduly complicates the Supreme Court's policy goals in its class actions rulings. 15

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No. 94-1363

Supreme Court of the United States

October Term, 1994

RICHARD ANDERSON; ROBERT EGGAN; CARL ENGLEHORN; NORRIS NIELSEN; TIMOTHY WANDERSEE; DONALD WOODS; PETER LOWRY,

Cross-Petitioners,

vs.

UNISYS CORPORATION, doing business as REMINGTON RAND UNIVAC, doing business as SPERRY UNIVAC, doing business as SPERRY, doing business as UNISYS, doing business as PARAMAX SYSTEMS,

Cross-Respondent.

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondents Eggan, Englehorn, Wandersee, Woods and Lowry ("non-Anderson/Nielsen Respondents") seek review of that part of the Eighth Circuit Court of Appeals' decision which affirms the district court's October 20, 1993, order. The Eighth Circuit's decision was issued on February 14, 1995, is reported at

47 F.3d 302 and reprinted in the Appendix ("A") to Petitioner's Writ at A, 5-22. The non-Anderson/Nielsen Respondents also seek review of the Eighth Circuit's April 19, 1995 denial of the non-Anderson/Nielsen Respondents' motion for a rehearing. The April 19, 1995, order is unreported and reprinted in the Appendix to Petitioner's Writ at A, 1-4.

Originally, the non-Anderson/Nielsen Respondents were specifically given permission to join in this action in an opinion of the district court issued on March 25, 1993. It is unreported and reprinted in the Appendix ("B") to Respondents' Brief in Opposition to a Writ of Certiorari at B, 4a-21a. The opinion of the district court granting Petitioner's motion to dismiss the federal claims of the non-Anderson/Nielsen Respondents and the state claims of all of the Respondents was issued on October 20, 1993. It is unreported and reprinted in the Appendix to Petitioner's Writ at A, 47-60. The order of the district court denying the non-Anderson/Nielsen Respondents' motion to reconsider their dismissal was issued on November 24, 1993. It is unreported and reprinted in the Appendix ("A") to Respondents' Writ at A, 1a-2a. The district court's denial of Petitioner's first motion for summary judgment is attached in the Appendix to Respondents' Brief in Opposition to a Writ of Certiorari at C, 22a-23a. The district court's opinion granting Petitioner's second motion for summary judgment was issued on December 28, 1993. It is unreported and reprinted in the Appendix to Petitioner's Writ at A, 23-46.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is appropriate and was invoked by Petitioner with its Petition for a Writ of Certiorari under 28 U.S.C. § 1254(1). Under 28 U.S.C. § 2101(c), the writ must be applied for within ninety days after the entry of judgment or decree. The 90 day period commences from the date of a denial of a petition for rehearing. The non-Anderson/Nielsen Respondents'

petition for a rehearing was denied on April 19, 1995. The 90 day period expired on July 19, 1995. Respondents received Petitioner's Petition for a Writ of Certiorari on July 18, 1995. Under Rule 12.3 of the Rules of the Supreme Court of the United States, a cross Petition must be filed within 30 days of the Respondents' receipt of Petitioner's Petition.

RELEVANT STATUTES AND RULES INVOLVED

29 U.S.C. § 626(d):

> No civil action may be commenced by an individual under this section until 60 days after a charge of discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed —
>
> * * *
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 626(e) (1) before its amendment by P.L. 102-166, Title I, § 115 Stat. 1079 on November 21, 1991:

> (1) Statute of limitations; reliance in future on administrative rulings, etc.; tolling. Sections 6 and 10 of the Portal-to-Portal Act of 1947 (29 USCS §§ 255 and 259) shall apply to actions under this Act.

29 U.S.C. § 255(a):

> (I)f the cause of action accrues on or after the date of the enactment of this Act (May 14, 1947) — (it) may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C. § 626(e):

> Statute of limitations; reliance in future on administrative rulings, etc.; tolling:
>
> Section 10 of the Portal-to-Portal Act of 1947 (29 USCS § 259) shall apply to actions under this Act. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) (29 USCS § 630(a)) against the respondent named in the charge within 90 days after the date of the receipt of such notice.

Fed. R. Civ. P. Rule 3: Commencement of Action.

> A civil action is commenced by filing a complaint with the Court.

Fed. R. Civ. P. Rule 4(m): Time Limit for Service.

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

Fed. R. Civ. P. Rule 15c: Relation Back of Amendments.

> An Amendment of a pleading relates back to the date of the original pleading when
>
> > (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> >
> > (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> >
> > (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied

> and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew of should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> The deliver or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Fed. R. Civ. P. Rule 54(b): Judgment Upon Multiple Claims or Involving Multiple Parties.

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all

> of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to review at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

STATEMENT OF THE CASE

This is an age discrimination action in which Respondents sought relief under the Minnesota Human Rights Act (MHRA) and the federal Age Discrimination in Employment Act (ADEA).

Petitioner Unisys Corporation has filed a Petition for a Writ of Certiorari. The non-Anderson/Nielsen Respondents have Cross Petitioned for a Writ of Certiorari.

The result of the Eighth Circuit's decision, which allows a claimant who never filed ADEA administrative charges to join this action in accordance with well established and widely adopted law, but excludes other claimants, who did file administrative charges and gave Petitioner early and full notice of their claims, is bizarre and ironic.

This action is an unfortunate example of the procedural morass into which federal discrimination actions often descend.

FACTUAL BACKGROUND

A. Involuntary Terminations

All five non-Anderson/Nielsen Respondents were employed for many years by Petitioner in its Software Engineering Department. They were all selected for termination at the same management meeting. Three were told they were laid off on April 2, 1990. Petitioner delayed informing the fourth non-Anderson/ Nielsen Respondent of his discharge, Donald Woods, until June 18, 1990.

Every Respondent was told by Petitioner that he was laid off in a "reduction in force." However, evidence uncovered during discovery showed that the number of regular employees and contract employees in the Department actually increased after the "reduction in force."

B. Administrative Proceedings

The non-Anderson/Nielsen Respondents consulted with an attorney on charge filing procedures several months after their termination. They all filed their administrative age discrimination charges with the Minnesota Department of Human Rights (MDHR), a deferral agency of the EEOC, within one year of their discharge.

A pro se age discrimination charge was also filed by Respondent Anderson, who had not consulted an attorney.

Four additional employees of Petitioner, terminated during the same layoff from other Departments of Petitioner's Electronic and Information Systems Group (EISG), (to which the Software Engineering Department belonged), also filed age discrimination charges. Pursuant to its role as a deferral agency, the MDHR notified the EEOC of the charges of all of Petitioner's

ex-employees, including the Respondents', who had filed charges.

Petitioner, in its defense to these charges, repeated the claim, which evidence later showed was untrue, that Respondents were discharged in a "reduction of force."

Petitioner additionally in its defense provided to the MDHR data purporting to show that its layoffs had no disproportionate impact on its older workers. At that time, Respondents challenged Petitioner's claim of no disproportionate impact, but did not have their own independent data.

However, after he commenced his legal action, Respondent Anderson received data from Petitioner that was strikingly different. This data showed that *87%* of the employees involuntarily laid off from the Software Engineering Department in 1990 were over the age of 40, even though only *40%* of the employees in the Department were over the age of 40. The data at first glance also seemed to show that age was a factor in the layoffs by the other Departments in EISG as well.

The MDHR cited as facts both of Petitioner's misrepresentations when it dismissed the claims of the six Respondents who had filed administrative charges.

The non-Anderson/Nielsen Respondents consulted with Attorney O'Brien after their administrative charges were dismissed. They did not commence their own legal action after these dismissals.

Respondent Anderson did. On February 10, 1992, he filed a pro se Complaint in federal court. The pro se Complaint specifically alleged that the age mix of Petitioner's employees who were terminated in the layoff was substantially greater than

the age mix of Petitioner's employees as a whole, and that Petitioner had engaged in the practice of terminating older employees under the pretext of creating new organizational groups.

Respondent Anderson then obtained legal counsel for the first time. With the assistance of this attorney, in June of 1992 Respondent Anderson filed an Amended Complaint. The Amended Complaint specifically stated the action was commenced to assert the rights of additional, similarly situated former employees. Both the Amended Complaint and the pro se Complaint were served on Petitioner on June 9, 1992, 119 days following the filing of the pro se Complaint.

C. Motion for Class Certification

On December 9, 1992, Respondent Anderson moved the court to certify a class consisting of employees of Petitioner's Software Engineering Department who were terminated in 1990.

For this motion Respondent Anderson personally had analyzed the voluminous data on the layoff that Petitioner had supplied during discovery. Respondent Anderson is a mathematician. He has a B.A., magna cum laude, with a major in mathematics, did graduate work in mathematics at the University of Minnesota, and worked as a mathematician for Petitioner.

At first, the data appeared to show that the layoff disproportionately impacted all of EISG's older employees. There was only a .5% probability that the particular age mix in the layoff was random and not related to age. However, Respondent Anderson discovered that the numbers from Petitioner's Software Engineering Department contaminated the overall EISG figures.

The statistical proof of age discrimination in the Software Engineering Department was particularly strong. The probability that the age mix in the layoff from the Department was random, and not related to age, was about .02%. If Software Engineering Department's data was subtracted from EISG's data, the probability that the selection by the other Departments of whom to lay off was random, and not related to age, rose above the 5% probability standard Respondent Anderson believed was needed for statistical validity.

On March 25, 1993, the district court, though it denied Respondent Anderson's request for class certification on the grounds that the requested class was not sufficiently numerous, ruled additional employees laid off in 1990 from the Software Engineering Department could piggyback on Respondent Anderson's claim and join this action. The non-Anderson/ Nielsen Respondents, who had filed administrative charges, along with Respondent Nielsen, who had not, joined this action in June of 1993 .

D. Motion to Dismiss the Non-Anderson/Nielsen Respondents

On July 28, 1993, Petitioner moved for the dismissal of the non-Anderson/Nielsen Respondents. Petitioner did not move for the dismissal of the ADEA claims of Respondent Nielsen. The district court granted this motion on October 20, 1993, but did not enter an appealable judgment or order.

In this motion Petitioner had argued, and the district court agreed, that the non-Anderson/Nielsen Respondents, who had filed administrative charges with the assistance of counsel, had to be dismissed, if the litigation statute of limitations had run, because they were represented by an attorney at the time they made their decisions not to proceed with their own individual

actions. Petitioner argued that the ADEA litigation statute of limitations had run because a 1991 amendment to the ADEA, whose application to this action shortened the litigation limitations period, retroactively applied to the non-Anderson/ Nielsen Respondents' claims. The only Respondent other than Anderson who was allowed to remain, Respondent Nielsen, had never filed an administrative charge.

After the motion to dismiss was granted, the non-Anderson/ Nielsen Respondents immediately moved the district court to reconsider its dismissal of their claims. In this motion, the non-Anderson/Nielsen Respondents specifically argued that the 1991 amendment to the ADEA litigation statute of limitations was not retroactive. The motion to reconsider this dismissal was denied by an order dated November 24, 1993.

The district court subsequently incorporated large portions of its initial October 20, 1993, order in its December 28, 1993, order entering judgment against all Respondents. However, the district court did not amend the portions so incorporated to reflect the fact that the non-Anderson/Nielsen Respondents had raised the retroactivity issue.

The December 28, 1993, order was an order for judgment and, thus, appealable. All Respondents timely appealed the district court's judgment to the Eighth Circuit Court of Appeals.

E. Appeal to the Eighth Circuit

In its February 14, 1995, decision, the Eighth Circuit partially reversed the district court and restored the ADEA claims of two of the Respondents, Richard Anderson and Norris Nielsen.

The Court of Appeals affirmed the district court's dismissal of the non-Anderson/Nielsen Plaintiffs.

The Eighth Circuit conceded that it was odd to allow Respondent Nielsen, who had never filed administrative charges, to remain in the action, while the non-Anderson/Nielsen Respondents, who had, could not.

> It is somewhat ironic * * * that Nielsen, who did not even file an administrative charge, is permitted to continue in this action while the others have been dismissed, and we believe that result requires a brief explanation. As we already indicated, * * * (T)he Civil Rights Act of 1991 altered that statute of limitations in ADEA cases. * * * The new statute of limitations is ninety days from the receipt of a right-to-sue letter from the EEOC. 29 U.S.C. sec. 626(e) (Supp. 1993). Nielsen never received a right-to-letter because he did not file an administrative charge.

The alteration to the ADEA statute of limitations that the Court of Appeals referred to changed the ADEA litigation limitations periods from 2 years / 3 years if willful to 90 days after the receipt of an EEOC right-to-sue letter. P.L. 102-166, Title I, § 115, 105 Stat. 1079. The amendment was adopted by Congress on November 21, 1991. However, all of the non-Anderson/ Nielsen Respondents were dismissed in 1990 and filed their charges in 1991 prior to the amendment.

Respondents Eggan, Englehorn and Lowry received their dismissal letters from the EEOC in October of 1991, before the amendment's adoption. They were told by the EEOC that the statute of limitations was 2 years / 3 years if willful.

Respondents Wandersee's and Woods' EEOC letters were dated January 31, 1992, shortly after the amendment was adopted. Nonetheless, the EEOC dismissal letters also told these

two Respondents that the limitations periods were 2 years / 3 years if willful.

Moreover, it is clear that on June 9, 1992, when Respondent Anderson's pro se Complaint and Amended Complaint was served, Petitioner also did not believe the new, shorter ADEA limitations period applied.

Petitioner continued to believe that the old limitations period was in effect, at least into early 1993. It argued when it opposed in 1992 Respondent Anderson's motion for class certification, that the 2 years / 3 years if willful limitations period applied, that the old statute of limitations barred the claims of the non-Anderson/ Nielsen Respondents, and that these Respondents therefore could not join this action. The district court disagreed, allowing the non-Anderson/Nielsen Respondents, by name, to enter the action in its March 25, 1993 order.

F. Petition for Rehearing

In their Petition for Rehearing, the non-Anderson/Nielsen Respondents contended that the Court of Appeals misconstrued the record on two material issues.

The Court of Appeals erroneously held, in footnote 14 of its first decision, that it could not consider the non-Anderson/ Nielsen Respondents' argument on appeal, that the amendment to the ADEA statute of limitations was not retroactive.

The Court of Appeals had also incorrectly concluded in its first opinion that Respondent Anderson's initial pro se Complaint was never served. The non-Anderson/Nielsen Respondents had indicated that the pro se Complaint had been served in their Appeal Briefs, but submitted more of the record in the Petition for Rehearing to confirm that representation.

The Petition for Rehearing was denied, however.

REASONS FOR GRANTING THE WRIT

I.

REVIEW IS REQUESTED BECAUSE THE EIGHTH CIRCUIT'S DECISION ESTABLISHES A NEW PRECEDENT THAT UNDERMINES WELL ESTABLISHED LAW ON THE "SINGLE FILING RULE", HAS THE BIZARRE RESULT OF EXCLUDING CLAIMANTS WHO FILE ADMINISTRATIVE CHARGES FROM JOINT OR CLASS ACTIONS BUT INCLUDING CLAIMANTS WHO DO NOT, AND CONFLICTS WITH AND UNDULY COMPLICATES THE SUPREME COURT'S POLICY GOALS IN ITS CLASS ACTIONS RULINGS.

Compelling reasons explain why Petitioner did not include Respondent Nielsen, the only Respondent in this action who did not file an administrative charge, in its motion to dismiss the ADEA claims of the non-Anderson/Nielsen Respondents. It is clear, under a well established and widely accepted legal principle, that claimants who did not file timely administrative charges can join actions commenced by another claimant who did.

This legal principle is often referred to as the "single filing rule." It has been applied by most, if not all, of the Courts of Appeals in ADEA actions. *See e.g., Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir. 1988); *Kloos v. Carter-Day Company*, 799 F.2d 397 (8th Cir. 1986); *Mistretta v. Sandia Corporation*, 639 F.2d 588 (10th Cir. 1980); *Bean v. Croker National Bank*, 600 F.2d 754 (9th Cir. 1979).

The "single filing rule," which has been applied in other types of discrimination cases besides age discrimination cases, is

well grounded in Supreme Court precedents. In *Zirpes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) the Court held that filing of a timely EEOC charge was not a jurisdictional prerequisite for a claimant to participate in a Title VII class action. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), the Court held that class members who had not filed administrative charges under the provisions of Title VII were still entitled to class-based relief.

The Eighth Circuit's decision on this issue, if allowed to stand, would have the ironic consequence of penalizing the more deserving claimants in class and joint actions.

Litigation statutes of limitations are tolled during the pendency of a class action for *all* putative class members while the class action is pending, *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), even if class certification is eventually denied because it cannot be shown that "the class is so numerous that joinder of all members is impracticable" (as it was in this case). *Chardon v. Fumero Soto*, 462 U.S. 650 (1983).

In *American Pipe*, the Court was emphatic that the claims of *all* putative class members were preserved, with no exceptions:

> Not until the existence and limits of the class have been established * * * does a class member have any duty to take note of the suit * * * (E)ven as to asserted class members who were unaware of the proceedings * * * or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action * * *

Surely, if the statute of limitations does not eliminate the claims of putative class members who are unaware that they might have a claim, as *American Pipe* holds, it should not eliminate the legal claims of the non-Anderson/Nielsen Respondents. Employers, when challenging tolling, often argue that they had no notice of, and could not preserve evidence on, the allegations of the additional claimants who did not initially file charges. Here, the non-Anderson/Nielsen Respondents did place Petitioner on notice and gave it a chance to locate and preserve its evidence.

If it is not reversed, the unintended message of the Eighth Circuit will be that a claimant is better off if he or she does not file an administrative charge, as long as one co-worker has. The use of the administrative process should be encouraged, rather than discouraged.

This new exception would also unwisely complicate class actions.

An important objective of class-action procedures is the promotion of efficiency and economy of litigation. *American Pipe*, 414 U.S. at 553-554. The procedures Respondent Anderson used in this action promoted efficiency and economy. He commenced a representative action and conducted discovery to identify the proper additional plaintiffs. The data he obtained showed that only some of the claimants who filed administrative charges were proper parties. Only these claimants, after review and approval by the district court, were then allowed to join.

The Court of Appeals' exception, unfortunately, would compel attorneys to hastily commence class actions and recruit every claimant who filed an administrative charge, regardless of what discovery might later show. Any weak claims thereby included could afterwards impair a clear focus on the evidence that established the more meritorious claims.

The Eighth Circuit's decision also ignores the Federal Rules of Civil Procedure.

Under Federal Rule of Civil Procedure 3, this action was commenced on February 10, 1992, when Respondent Anderson filed his pro se Complaint. The pro se Complaint alleged there was age discrimination by Petitioner against other older workers besides Respondent Anderson in the lay off and that Petitioner had engaged in a systematic pattern of age discrimination.

Under Federal Rules of Civil Procedure 4(m) and 15(c), Respondent Anderson's Amended Complaint, in which he first formerly indicated he was pursuing a representative action, relates back to the filing of the pro se Complaint.

Even if the new, 90 day ADEA statute of limitations applies to the claims of the non-Anderson/Nielsen Respondents, two of these Respondents still had viable claims on February 10, 1992. Respondents Wandersee's and Woods' EEOC dismissal letters were dated January 31, 1992.

Finally, the result of the Eighth Circuit's decision runs counter to everybody's initial expectation of what the applicable ADEA statue of limitations was, including Petitioner's. All of the dismissal letters from the EEOC stated the old 2 year / 3 year if willful periods applied. Petitioner argued that the old limitations periods applied when it opposed the class certification motion in December of 1992. The non-Anderson/Nielsen Respondents had a right to rely on the EEOC's representations, which did not contain any indication of uncertainty on the part of the EEOC as a result of the amendment, regardless of whether they were represented by an attorney.

Indeed, an attorney advising a client today could easily conclude that the 1991 amendment to the ADEA statute of limitations is not retroactive.

In *Landgraf v. USI Filing Products,* 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) the Court issued a decision on the retroactivity of parts of the 1991 amendments to the Civil Rights Laws, though not the amendment to the ADEA limitations period.

Landgraf held that in deciding whether a statute is retroactive.

> the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.
>
> (R)etroactivity is a matter on which judges tend to have "sound instinct(s)," * * * and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

CONCLUSION

The non-Anderson/Nielsen Respondents request, for the reasons above stated, that the Court grant their request for review and ultimately reverse the Eighth Circuit Court of Appeals decision that they cannot join the action Respondent Anderson commenced.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA FOURTH DIVISION FILED NOVEMBER 24, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-92-138

Richard Anderson, Robert Eggan, Carl Englehorn, Norris Nielsen, Timothy Wandersee, Donald Woods, Peter Lowry,

Plaintiffs,

v.

UNISYS Corporation d/b/a Remington Rand Univac d/b/a Sperry Univac d/b/a Sperry d/b/a Unisys d/b/a Paramax Systems,

Defendant.

ORDER

Douglas P. Kempf, Kempf & Kempf, 7801 East Bush Lake Road, Suite 260, Bloomington, MN 55439-3112, for plaintiffs.

Thomas M. Sipkins, Joseph G. Schmitt, Popham, Haik, Schnobrich, & Kaufman, Ltd., 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, MN 55402, for defendant.

Plaintiffs have moved the Court to reconsider its order of October 20, 1993. Extensive briefs have been submitted in connection with the motion.

Appendix A

The Court has reviewed the briefs and has concluded that plaintiffs' motion for reconsideration should be in all things denied.

Accordingly, based on all the files, records and proceedings herein,

IT IS ORDERED that plaintiffs' motion for reconsideration is in all things denied.

s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: November 24, 1993

Supreme Court, U.S.
FILED
SEP 20 1995
CLERK

(2)

No. 95-281

In the
Supreme Court of the United States
October Term, 1995

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Cross-Petitioners,

vs.

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Cross-Respondent.

ON CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Cross-Petitioners Eggan, Englehorn, Lowry, Wandersee and Woods ("Cross-Petitioners") may revive extinguished claims against Cross-Respondent Unisys Corp. ("Unisys"), after making an affirmative decision, while advised and represented by counsel, not to proceed with a suit against Unisys?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding below are those listed in the caption on the cover of this petition.

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No. 95-281

SUPREME COURT OF THE UNITED STATES

Richard Anderson; Robert Eggan; Carl Englehorn; Norris Nielsen; Timothy Wandersee; Donald Woods; Peter Lowry,

Cross-Petitioners.

v.

Unisys Corporation, doing business as Remington Rand Univac, doing business as Sperry Univac, doing business as Sperry, doing business as Unisys, doing business as Paramax Systems,

Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States District Court for the District of Minnesota granting Unisys' motion to dismiss was issued on October 20, 1993. It is unreported and reprinted in the Appendix to Unisys's Petition for Certiorari ("A") at A-47-60. The District Court's Opinion granting Unisys' motion for reconsideration was issued on December 28, 1993. It is unreported and reprinted at A-23-46.

Cross-Petitioners appealed to the Eighth Circuit Court of Appeals. A panel of the Court of Appeals issued a decision affirming the District Court's October 20, 1993 Order, but reversing the December 28, 1993 Order. The decision was issued on February 14, 1995, is reported at 47 F.3d 302 and reprinted at A-5-22. On April 19, 1995, the panel denied Cross-Petitioners' motion for rehearing. The April 19, 1995 Order is unreported and reprinted at A-1-4.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Eighth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1), which provides for review "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Under 28 U.S.C. § 2101(c), the writ must be "taken or applied for within ninety days after the entry of the judgment or decree." *See* Sup. Ct. R. 13.1. The 90 day period commences from the date of a denial of a petition for rehearing. In this case, Cross-Petitioners' petition for rehearing was denied on April 19, 1995. The 90 day period

would have expired on July 19, 1995. Unisys' Petition for Certiorari was filed on July 18, 1995. The thirty day period would have expired on August 18, 1995. Cross-Petitioners' cross petition was filed on August 18, 1995.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 626(d):

No civil action may be commenced by an individual under this section until 60 days after a charge of discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 633(b):

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant and seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, that such sixty day period shall be extended to one hundred and twenty days during the first year after the

effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

STATEMENT OF THE CASE

Cross-Petitioners made an affirmative decision, while advised by counsel, not to proceed with an action against Unisys. Cross-Petitioners were informed by counsel of the date that their claims against Unisys would expire, and elected not to bring an action because they believed it would be too expensive to proceed. The Eighth Circuit Court of Appeals recognized that fact, and therefore held that Cross-Petitioners could not later revive their extinguished claims based on the "single filing rule" articulated by this Court in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). The Eighth Circuit Court of Appeals' decision is quite consistent with both the long line of cases establishing that an affirmative decision, while advised by counsel, not to proceed with a lawsuit forecloses a claimant from reviving his or her claims at a later date and with the purposes of the single filing rule, by allowing all other claimants to rely upon the single timely filing. No split of the Circuits exists on this issue; Cross-Petitioners do not suggest a single case in which any Court held that such individuals may revive claims after they decided, while advised by counsel, to allow those claims to expire. This Court should reject this cross-petition.

I. BACKGROUND

The background facts relevant to this cross-petition are described in pages 6-8 of Unisys' Petition for Certiorari. As is set forth in detail therein, this case arises from two sets of layoffs at Unisys' facility in Eagan, Minnesota in 1990. On April 2, 1990, Cross-Petitioners Anderson, Eggan, Englehorn, Lowry, Nielsen and Wandersee were informed that they were to be laid off. A second layoff occurred approximately two and one-half months later. On June 18, 1990, Cross-Petitioner Woods was informed that he would be laid off.[1]

Cross-Petitioners Eggan, Englehorn, Lowry, Woods and Wandersee all sought legal advice after their layoffs. Before they filed charges with the MDHR and the EEOC, they engaged Maurice O'Brien, a plaintiff-side employment law specialist at Gordon, Miller & O'Brien. Attorney O'Brien advised Cross-Petitioners in the charge-filing process.

More than 300 days passed before any Cross-Petitioner filed a charge of discrimination. Cross-Petitioners Eggan, Englehorn, Lowry, and Wandersee filed charges, by and through legal counsel, on April 1, 1991, one year after receiving notice of their layoff. Cross-Petitioner Woods

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[1] Numerous other layoffs have occurred in Unisys's software engineering department, most recently in 1994. Since 1986, Unisys' work force had been reduced from 125,000 to 60,000 through attrition, reductions and freezes on hiring.

separately filed a charge, by and through legal counsel, on June 4, 1991, well over 300 days after he was notified of his layoff.

Ruling separately in each case on requests to reconsider, the MDHR affirmed or reaffirmed its finding[2] that there was no probable cause to support the claims. Cross-Petitioners Eggan, Englehorn, Lowry, Woods and their counsel were notified in separate letters dated December 24, 1991 that no further action would be taken on the claims and that they had 45 days to begin litigation in accordance with Minnesota statutes. Plaintiff-Appellant Wandersee and his counsel received a similar notification on December 27, 1991.

Cross-Petitioners then met with Attorney O'Brien to discuss their options. Attorney O'Brien informed them that they could file a lawsuit in court, and explained that they had a forty-five day time limit for filing. Attorney O'Brien was willing to proceed to state or federal court, but Cross-Petitioners elected not to do so because they believed such an action would be too expensive.

On February 10, 1992, Plaintiff-Appellant Anderson filed, but did not serve, a complaint in Federal Court alleging

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[2] Cross-Petitioners' claims that Unisys misled the MDHR (which were rejected by the District Court and not addressed by the Eighth Circuit) are false: Unisys did not submit any statistical analyses or expert report to the MDHR, which conducted its own statistical analysis of the layoff and concluded that the evidence did not support a finding of probable cause of age discrimination.

state and federal discrimination claims. No claims on behalf of other employees were asserted in that complaint, which was not designated as a "class" complaint. On June 9, 1992 -- 119 days after this filing -- an amended complaint was served in which Plaintiff-Appellant Anderson first purported to represent a class of similarly situated employees. On March 25, 1993, the Court denied Plaintiff-Appellant Anderson's motion for class certification, but allowed members of the putative class to join the action. A-25. Six such "putative plaintiffs" elected to do so.

II. DISTRICT COURT'S DECISIONS

On October 20, 1993, the District Court held that the claims of Cross-Petitioners were untimely. The Court first held that Cross-Petitioners "received [ADEA] right to sue letters and deliberately decided not to file lawsuits after receiving legal advice." A-56. The Court explained that it could "only conclude that [Cross-Petitioners] made a deliberate and counseled decision not to proceed and to allow the statute of limitations to run." A-57. As a result, it dismissed their claims.

III. COURT OF APPEALS' OPINION

The Eighth Circuit Court of Appeals affirmed the District Court's October 20, 1993 Order dismissing Cross-Petitioners' claims against Unisys. The Court of Appeals upheld the District Court's conclusion that Cross-Petitioners' affirmative decision, while advised by counsel, not to proceed with an action against Unisys precluded them from later reviving their claims:

> The district court reasoned that those plaintiffs who had received their right-to-sue letters and thereafter deliberately decided not to file suit within the statute of limitations should be dismissed, but that Nielsen could continue to pursue his ADEA claim. We agree with the district court that the failure of those plaintiffs to file suit within ninety days after the receipt of their right-to-sue letters precludes them from joining Anderson's suit. They were given an opportunity to bring suit upon the issuance of the right-to-sue letter and failed to timely do so.

A-17-18. The Court of Appeals rejected Cross-Petitioners' argument that this decision was contrary to the single-filing rule set forth in *American Pipe*:

> Appellants' reliance on the American Pipe rule is misplaced. In American Pipe, the Court stressed the rule was "in no way inconsistent with the functional operation of a statute of limitations" because "[w]ithin the period set forth by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and the size of the projected litigation . . " Id. at 554-55. Here, the statute of limitations had run on the claims of all of the parties who had received right-to-sue letters, with the exception of Anderson, before Anderson ever purported to file on behalf of a class of similarly situated employees in June of 1992.

> Unisys therefore did not know it was facing multiple litigants in a representative suit until after both the state and federal statute of limitations had run. The American Pipe rule does not operate to revive stale claims, but rather tolls the limitations period on viable claims while the trial court determines the parameters of the class in any possible class action. Thus, the district court did not err in failing to apply the American Pipe rule.

A-18-19 (ellipses and parentheses in original).

The Court concluded that claimants such as the Cross-Petitioners may not rely upon the single-filing rule:

> Those plaintiffs who do file administrative charges, however, should be bound by the statute of limitations, which is normally stated in the right-to-sue letter. Even if those plaintiffs are piggybacking on another employee's timely administrative charge, once they file separate administrative charges, they cannot rely any further on the other claimant's actions and must timely file suit after receiving their right-to-sue letters. Thus, any claimant who files an administrative charge and receives a right-to-sue letter from the EEOC must file suit within ninety days after receiving that letter to preserve the cause of action.

A-20.

REASONS FOR REFUSING THE WRIT

I. CROSS-PETITIONERS' DECISION NOT TO PROCEED WITH AN ACTION PRECLUDES RELIANCE ON TOLLING

Cross-Petitioners seek to avoid the fact that they made a conscious decision, while represented and advised by counsel, not to proceed with this lawsuit. This affirmative decision not to proceed, while advised by counsel, precludes Cross-Petitioners from relying upon *American Pipe* or the single-filing rule and itself justifies dismissal of their claims.

Cross-Petitioners were represented over a period of eight to ten months by an employment law specialist, who explicitly advised them concerning the charge-filing process and age discrimination statutes, and who indicated to Cross-Petitioners that if they proceeded with a lawsuit, he would represent them. Mr. O'Brien briefed Cross-Petitioners on the issues involved in their claims and actually represented them at the EEOC and the MDHR. Moreover, after the Cross-Petitioners received their final determinations of no probable cause, he met with them, and advised them of their rights, offered to represent them and explained that, if they did not file within timelines, their claims would be time-barred.

Despite Mr. O'Brien's advice and offer of representation, Cross-Petitioners elected not to file an action against Unisys. This decision was based on the cost involved in such a lawsuit. As a result, they informed O'Brien that they did not wish to proceed. O'Brien gave them the name of at least one other plaintiff-side employment attorney, and advised them to consult other attorneys to attempt to obtain

a fee structure which would allow them to pursue the suit. He urged them to do so quickly, and warned them that they had forty-five days within which to file a claim. Cross-Petitioners decided as a group not to do so. Richard Anderson decided to proceed alone, pro se, and did so.

The Eighth Circuit Court of Appeals correctly observed that Cross-Petitioners' consultations with O'Brien are sufficient to preclude them from equitably tolling the ADEA's statute of limitations. A variety of Circuits have addressed similar situations, and have held that such consultations preclude reliance on equitable tolling principles. *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 753 (1st Cir. 1988) ("constructive knowledge . . . is "attributed" to an employee in situations when he has retained an attorney"); *Morse v. Daily Press, Inc.*, 826 F.2d 1351 (4th Cir. 1987), *cert. denied*, 484 U.S. 965 (1987) ("retaining an attorney extinguishes the equitable reasons for tolling the 180 day period"); *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950 (8th Cir. 1986) (plaintiff "concedes that prior to her discharge [she] was aware of her right to bring suit under the ADEA, having already consulted with an EEOC attorney. [Defendant] met its burden of proving [she] knew generally of her rights"); *Cano v. U.S. Postal Serv.*, 755 F.2d 221, 222 (1st Cir. 1985) (plaintiff "consulted with an attorney about her employment difficulties just prior to the beginning of the limitations period and subsequently, she could be charged with constructive knowledge of the relevant Title VII provisions and the procedural requirements of filing an EEOC complaint"); *Edwards v. Kaiser Aluminum & Chem. Sales, Inc.*, 515 F.2d 1195, 1200 (5th Cir. 1975) (consultation with attorney precludes tolling). *See United States v. Kubrick*, 444 U.S. 111, 123 (1979) ("A plaintiff . . . armed with the facts

about the harm done to him, can protect himself by seeking advice in the medical and legal community"). Cross-Petitioners' informed and counseled decision not to proceed, and their failure to file or serve a timely Complaint, precludes them from circumventing the ADEA's statute of limitations.[3]

The Eighth Circuit Court of Appeals' decision reconciled this line of decisions, and the rule against allowing a party who made a counseled decision not to proceed with an action to toll the statute of limitations, with the single-filing rule of *American Pipe*. Cross-Petitioners do not cite a single case in which the single-filing rule was applied to permit individuals who had consulted with an attorney, and who had elected not to file a lawsuit, to then piggy-back their untimely claims on those of a timely plaintiff.[4] As discussed

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[3] Cross-Petitioners' observation that a claimant may be worse off if he or she files a charge and then chooses not to pursue a claim than if he or she had not filed a charge at all is understandable under these circumstances. Traditional statute of limitations analysis provides that a party that is ignorant of a claim may be entitled to toll the statute while a party that does some investigation, discovers the claim, and chooses not to go forward, is not entitled to tolling. That is exactly the rule articulated by the Eighth Circuit in this case. Cross-Petitioners' suggestion that the "more deserving" claimants are penalized is thus precisely backwards: those parties who realized that they had a claim, but decided not to pursue it, are thereafter precluded from reviving that claim.

[4] In fact, not only is there no "split" in the Courts on the issue, but at least one other court has relied on similar

above, consultations with an attorney extinguish a plaintiff's ability to toll the statute of limitations. The single-filing rule is yet another mechanism by which the statute of limitations may be tolled. *American Pipe*, 414 U.S. at 555 ("the tolling rule we establish here"). The Cross-Petitioners cannot suggest any reason why this tolling is not also extinguished.

In fact, the purpose behind the single-filing rule does not support the Cross-Petitioners' claims. The single-filing rule was adopted because without it:

> Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable . . . .a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions.

American Pipe, 414 U.S. at 553-554. In this case, Cross-Petitioners had already decided not to file an action when Anderson filed his Complaint. There was no threat of duplication, or of motions to intervene: Cross-Petitioners had already decided that they did not wish to participate in such a lawsuit. They were not waiting to see whether Anderson was successful, nor did they consider that he filed on their

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reasoning as that set forth by the Eighth Circuit in this case. *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 746 F. Supp. 40, 42 (D. Kan. 1990) (relation back doctrine inappropriate against a new defendant because plaintiff made a "conscious decision" to leave defendant out of the original complaint).

behalf. He was going it alone. Cross-Petitioners' argument, if accepted, would make a shambles of all timelines and policies underlying "closure" in statutes of limitations.

The Eighth Circuit's decision is also consistent with the economy and efficiency objectives of the *American Pipe* single filing rule. The Court of Appeals' holding applies only to those claimants that file a charge of discrimination, retain counsel, and subsequently make an affirmative decision not to proceed with a lawsuit. This rule establishes a bright-line test that is easy to administer and efficient in operation.

Cross-Petitioners respond that this rule would "compel attorneys to . . . recruit every claimant who filed an administrative charge" resulting in the inclusion of "weak claims" that "could afterwards impair a clear focus on the evidence that established the more meritorious claims." This argument is nonsensical: the attorneys could easily interview the potential claimants at the time of recruitment to determine if they possessed an appropriate claim. Moreover, every class action contains stronger and weaker claims, and the rule set forth by the Eighth Circuit will not change that fact. If anything, this rule would exclude precisely those claimants that should be excluded: those whose claims were dismissed by the administrative agency and who decided that their claims were not worth pursuing in court.[5]

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[5] Cross-Petitioners also mention the issue of whether the statute of limitations contained in the 1991 Civil Rights Act Amendments may be applied retroactively. The Eighth Circuit Court of Appeals held that this issue was not properly raised below and may not be raised on appeal, a conclusion

Cross-Petitioners made an affirmative decision, while advised by counsel, not to proceed with an action against Unisys. They elected to allow the statute of limitations to expire on their claims. They should not be permitted to revive those claims at this late date.

CONCLUSION

For all of these reasons, Unisys respectfully requests that this Court deny the cross-petition for a writ of certiorari.

Respectfully submitted this 20th day of September, 1995.

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that Cross-Petitioners do not challenge here. See A-17, n. 14.